OFFICE OF THE OMBUDSMAN AND INFORMATION & PRIVACY COMMISSIONER

annual report

YUKON LEGISLATIVE ASSEMBLY
Office of the Ombudsman

January 1 – December 31..... 2001

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YUKON LEGISLATIVE ASSEMBLY
Office of the Ombudsman

December 2002

Speaker of the Legislative Assembly
P.O. Box 2703
Whitehorse, Yukon
Y1A 2C6

Mr. Speaker:

I have the pleasure of presenting to you and through you to the Legislative Assembly the Annual Report of the Yukon Ombudsman and Information & Privacy Commissioner.

This report is submitted pursuant to Section 31(1), *Ombudsman Act* and Section 47(1), *Access to Information and Protection of Privacy Act*. The report covers the activities of the Office of the Ombudsman and the Information & Privacy Commissioner for the period January 1, 2001 to December 31, 2001.

Yours truly,

H Moorlag.

Hank Moorlag
Ombudsman

Mission Statement

TO PROVIDE AN INDEPENDENT, IMPARTIAL MEANS BY WHICH PUBLIC COMPLAINTS CONCERNING THE GOVERNMENT OF YUKON CAN BE HEARD AND INVESTIGATED UNDER THE *OMBUDSMAN ACT*.

TO PROVIDE AN EFFECTIVE AVENUE FOR RECEIVING AND PROCESSING PUBLIC COMPLAINTS AND REQUESTS FOR THE REVIEW OF DECISIONS BY PUBLIC BODIES RELATED TO THE *ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT*.

TO PROMOTE FAIRNESS, OPENNESS AND ACCOUNTABILITY IN PUBLIC ADMINISTRATION.

Ombudsman

YEAR IN REVIEW

This is the fifth annual report to the Yukon Legislative Assembly on the operation of the Office of the Ombudsman. I am mindful, in the preparation of the annual report, that its content serves several purposes. As an independent officer of the Legislative Assembly, I use my annual report as a means of accountability. It also provides an opportunity to communicate to the administrative branch of government any gains or setbacks in achieving an improved level of administrative fairness. At the same time, it discharges the important duty to inform the public about what we do and how we do it.

In an effort to achieve these purposes, this report includes statistical tables reflecting the volume and nature of the work carried out. It also presents discussions of how various provisions of the *Ombudsman Act* operate to deal with public complaints. The topics selected for these discussions reflect actual cases handled throughout the year. Assuming that a variety of matters emerge year by year, as has been the case so far, a broad scope of our work and the operation of the *Act* can be presented through this and future reports.

The statistical tables show 83 jurisdictional complaints received during 2001. This figure represents only complaints related to the Government of Yukon and its agencies. Complaints related to the federal government, a first nations government, or private sector organizations are referred to other offices or individuals who may be able to assist. A total of 68 non-jurisdictional complaints were handled in this way during 2001. There were an additional 78 requests for information.

Of the 83 jurisdictional complaints received, 11 were opened as investigations and the remaining 72 were dealt with in other ways as indicated in the Resolution of Jurisdictional Complaints Table. At the beginning of 2001 there were 27 investigations carried forward from the previous year. A total of 18 investigations were completed in 2001 so that 20 were carried forward to 2002.

During the past two years, I raised concerns about a growing backlog of files. I am now pleased to report that progress continues to be made in reducing the backlog, and we are able to attend to the necessary investigations within a much more acceptable time frame.

In this report, as in previous ones, I emphasize the benefit of appropriate early intervention by administrative levels of government in resolving complaints. Often when people come to the Ombudsman they have already made efforts to have concerns addressed through their contact with government officials, without success. If people bring their complaints to the Ombudsman before informing the department or agency of their concerns, they are asked to write to the head of the department or agency so there is an opportunity for matters to be addressed internally.

Appropriate intervention means actively listening to an individual's concerns, no matter how they may be presented, and being open to the possibility that there is some validity to those concerns. This sometimes requires a dramatic shift in attitude about openness and accountability. It is human nature to become defensive in the face of criticism.

A few cases investigated by the Ombudsman encountered this defensive posture because officials took an inflexible approach at the outset. Often decisions and actions are rationalized on the basis of policy requirements, entrenched practices or conventions. Positions are then sometimes supported with legal advice that almost always seeks to justify the decisions or actions, adding to the adversity in ways that make it impossible to bring the matter to a successful and timely resolution. Two such investigations are now in the final stages of settlement.

Despite these isolated cases, our work over the past year with public authorities generally reflects a growing openness on the part of officials to accept criticism and an increased willingness to revisit decisions or administrative practices. This is a very encouraging trend. It has reduced significantly the need for a formal report and the often difficult process of negotiating the acceptance of recommendations. In an increasing number of cases, an interim report (sometimes verbal) on the results of the investigation with proposed recommendations to the Deputy Minister has led to a speedy settlement of the complaint.

In addition to the influence of our office as an agent for change, this positive trend can also be attributed to the government's continued commitment to its Service Leadership Program. As highlighted in last year's annual report, this program provides a quality service course for public servants through facilitated discussions aimed at finding ways to improve the delivery of government services.

Ombudsman Issues

IS A COMPLAINT ABOUT AN "AUTHORITY"?

When the Ombudsman receives a complaint he must first determine whether or not he has the authority to investigate the body or authority that is the subject of the complaint. The Ombudsman's jurisdiction is broad. The Ombudsman can investigate complaints about all departments of territorial government, crown corporations such as Yukon Energy Corporation, and independent authorities or boards including, for example, the Yukon Worker's Compensation Health & Safety Board, the Mental Health Review Board, the Social Assistance Appeal Committee and Board and the Yukon Legal Services Society. The Ombudsman can also investigate public schools and Yukon College, hospitals, local and regional health bodies and governing bodies of professional associations such as the Law Society of the Yukon.

Each year the Office of the Ombudsman receives a number of complaints that are beyond the Ombudsman's jurisdiction to investigate. As Territorial Ombudsman, he cannot conduct investigations regarding federal matters. The Ombudsman cannot investigate decisions of courts or complaints regarding private sector organizations. He can only investigate municipalities and Yukon First Nation governments when they refer a matter to him for investigation. Non-jurisdictional complaints are referred to other agencies that may be able to help. This may be a referral to a review or appeal available through the federal or municipal program complained about or to other agencies such as the Law Line.

POWERS AND DUTIES OF OMBUDSMAN IN MATTERS OF ADMINISTRATION

11. (1) It is the function and duty of the Ombudsman to investigate on a complaint any decision or recommendation made, including a recommendation made to a Minister, or any act done or omitted, relating to a matter of administration and affecting any person or body of persons in his, her or its personal capacity, in or by any authority, or by any officer, employee or member thereof in the exercise of any power or function conferred on him or her by any enactment.

WHAT IF A RIGHT OF APPEAL EXISTS?

Section 12 of the *Ombudsman Act* establishes the Ombudsman as a reviewer of last resort. The section requires complainants to go through any statutory right of appeal or review that is available to them before the Ombudsman can consider initiating an investigation.

Several requirements must be met before an investigation will be declined under this section:

- the right of appeal must be contained in a statute or regulation;
- the appeal or review body must also be set out in the statute; and
- the appeal must be on the merits, meaning the appeal body has the power both to substitute its own decision for that of the authority, and make any order that the authority could have made.

In 2001 there were several complaints the Ombudsman was prevented from investigating because the complainant had not exhausted a section 12 right of appeal or review.

An individual complained to our office about a bill received from Yukon Energy Corporation for work done to stabilize a power pole. The complainant maintained that the work was not necessary and refused to pay the bill. The Ombudsman determined that under the *Public Utilities Act*, the complainant had a right of appeal to the Public Utilities Board from the decision of YEC. The Ombudsman was of the opinion that this appeal right included a full hearing on the merits and met all of the other requirements of section 12. Consequently he declined to investigate the complaint. The complainant was advised to appeal but to contact the Ombudsman afterwards if not satisfied with the outcome.

In another case, a complainant alleged being unfairly denied social assistance benefits under the *Social Assistance Act*. In the income assistance system there are two levels of statutory appeal from a decision of a financial assistance worker about benefits: an appeal to the Social Assistance Appeal Committee and an appeal to the Social Assistance Appeal Board. Both of these rights of appeal meet the requirements of section 12. The Ombudsman declined to investigate the financial assistance worker's decision until the appeals had been completed or the time for filing the appeals had expired. In this case the Ombudsman advised the person to appeal but to contact the office again if the fairness concern was not addressed through the appeal process.

JURISDICTION OF OMBUDSMAN

12. (1) This *Act* does not authorize the Ombudsman to investigate a decision, recommendation, act or omission

(a) in respect of which there is under an enactment a right of appeal or objection or a right to apply for review on the merits of the case to a court or tribunal constituted by or under an enactment, until after that right of appeal, objection or application has been exercised in the particular case or until after the time prescribed for the exercise of that right has expired; or

(b) of a person acting as a solicitor for an authority or acting as counsel to an authority in relation to a proceeding.

(2) The Ombudsman may not investigate conduct occurring prior to the commencement of this *Act*.

(3) Where a question arises as to the Ombudsman's jurisdiction to investigate a case or class of cases under this *Act*, he or she may apply to the Supreme Court for a declaratory order determining the question.

CAN THE OMBUDSMAN DECLINE TO INVESTIGATE?

Even after the Ombudsman is satisfied that he has jurisdiction to investigate a complaint, section 14 lists the circumstances when the Ombudsman can exercise his discretion to refuse to investigate or discontinue an investigation. For example, if he is of the opinion that the complaint is frivolous or vexatious or not made in good faith, or if it is determined the complainant has insufficient personal interest in the subject matter of the complaint, the Ombudsman could exercise his discretion to refuse to investigate the complaint.

A quick look at the statistical table of jurisdictional complaints reveals that 51 were referred. Many of these involved section 14(c) of the *Act*, which permits the Ombudsman to exercise his discretion to refuse to investigate where an adequate administrative remedy is in place and the complainant has not used that process to try and resolve the concern. Many authorities have developed internal administrative processes or mechanisms intended to deal with complaints, recognizing that they, as well as the complainant, benefit from early resolution of complaints. These mechanisms allow authorities to identify areas for improvement and give them another chance to ensure they are providing quality service to the public. Consequently, the Ombudsman encourages authorities to develop internal review or complaint resolution mechanisms as a means of resolving complaints without the involvement of the Office of the Ombudsman.

REFUSAL TO INVESTIGATE

14. The Ombudsman may refuse to investigate or cease investigating a complaint where in his or her opinion

    (a) the complainant or person aggrieved knew or ought to have known of the decision, recommendation, act or omission to which his or her complaint refers more than one year before the complaint was received by the Ombudsman;

    (b) the subject matter of the complaint primarily affects a person other than the complainant and the complainant does not have sufficient personal interest in it;

    (c) the law or existing administrative procedure provides a remedy adequate in the circumstances for the person aggrieved, and if the person aggrieved has not availed himself or herself of the remedy, there is no reasonable justification for his or her failure to do so;

    (d) the complaint is frivolous, vexatious, not made in good faith or concerns a trivial matter;

    (e) having regard to all the circumstances, further investigation is not necessary in order to consider the complaint; or

    (f) in the circumstances, investigation would not benefit the complainant or person aggrieved.

When an internal complaint mechanism exists that the Ombudsman believes is adequate, he expects the complainant to pursue that remedy before he will become involved. This discretion is a useful one when the Ombudsman knows that an authority has a good internal complaint mechanism. The Ombudsman considers a complaint mechanism to be adequate when the authority has a process for fairly considering a complaint.

WHAT IS UNFAIRNESS?

The question often arises about how the Ombudsman decides that an authority acted unfairly. Notions of "fairness" are not usually well defined and different individuals will have different views on what is or is not fair in a particular situation. Under the *Ombudsman Act*

"unfairness" has a special meaning. Unfairness is a generic term that includes a number of different criteria or grounds. Section 23 of the *Act* lists the grounds on which the Ombudsman may base his opinion that an authority acted unfairly.

Very similar grounds are found in Ombudsman legislation across Canada. As a result, generally accepted meanings for each of the grounds have emerged.

In one case involving the Yukon Housing Authority, the Ombudsman substantiated a complaint on the ground that the decision made was improperly discriminatory. Yukon Housing Authority policy assessed rent for self-employed persons on a different standard than other employed tenants. While many government programs discriminate among groups of people for very sound reasons, discrimination is improper when it is not necessary to meet the objectives of the program. In this case, Yukon Housing Authority's policy impacted negatively on a specific group of tenants with no rational connection between the policy and the objectives of the housing program. The Ombudsman recommended that the authority cease applying the policy. The authority accepted the Ombudsman's recommendation and developed a new policy for assessing rent that was the same for all employed tenants. The complainant's rent was reassessed using the revised policy.

PROCEDURE AFTER INVESTIGATION

23. (1) Where, after completing an investigation, the Ombudsman believes that

(a) a decision, recommendation, act or omission that was the subject matter of the investigation was

(i) contrary to law;

(ii) unjust, oppressive or improperly discriminatory;

(iii) made, done or omitted pursuant to a statutory provision or other rule of law or practice that is unjust, oppressive or improperly discriminatory;

(iv) based in whole or in part on a mistake of law or fact or in irrelevant grounds or consideration;

(v) related to the application of arbitrary, unreasonable or unfair procedures; or

(vi) otherwise wrong;

(b) in doing or omitting an act or in making or acting on a decision or recommendation, an authority

(i) did so for an improper purpose;

(ii) failed to give adequate and appropriate reasons in relation to the nature of the matter; or

(iii) was negligent or acted improperly; or

(c) there was unreasonable delay in dealing with the subject matter of the investigation,

the Ombudsman shall report his or her opinion and the reasons for it to the authority and may make the recommendation he or she considers appropriate.

As this case illustrates, an investigation of an individual complaint can lead to a review of a policy and its application, resulting in a change in policy that will have a positive impact on others in the same situation.

In another case the Ombudsman substantiated a complaint on the basis that the authority took into account irrelevant grounds or considerations in coming to a decision affecting the complainant. This case involved a complaint about the process for contracting and purchasing on behalf of the Government of Yukon. The complainant alleged that there were irregularities in the bid handling procedures. In this case the Ombudsman determined that the authority's decision was based on information that bore no reasonable relationship to the matter to be decided and was therefore unfair. While the results of this investigation did not change the situation for the complainant, the authority benefited from an independent review of its practices and steps are being taken to minimize the possibility of a recurrence of the situation.

The Ombudsman substantiated a complaint about a decision made in the course of a competition for a position within a department on the basis that it was made for an improper purpose. A decision is made for an improper purpose when favoritism or personal gain exists, or when the intention to promote a particular outcome motivates the authority. In this case the Ombudsman determined that a hiring policy was ignored in order to ensure a desired result. The authority accepted the Ombudsman's recommendations to address the unfairness and wrote a letter to the complainant. The letter acknowledged the complaint as valid and outlined the steps being taken to ensure human resource personnel will follow the policy as outlined to avoid a repetition of the situation.

CAN COMPLAINTS BE SETTLED WITHOUT INVESTI-GATION?

Section 15 of the *Ombudsman Act* allows the Ombudsman to consult with an authority in an attempt to settle a complaint at any time during or after an investigation. Where an authority is willing to address the complainant's concern identified during an investigation, the Ombudsman can settle the complaint without having to complete the investigation and issue a formal report under section 23.

In one case, a contractor providing a service to the government complained that the authority incorrectly provided information about the contractor's earnings to another agency. In discussions during the course of the investigation, the authority acknowledged the concern and identified changes that could be made to its administrative practice to ensure information was not released to other agencies except where there was a legal requirement to do so. The discussion resulted in a solution that addressed the problem identified by the complainant and ensured that others in the same situation would benefit from the changes to the authority's administrative procedures.

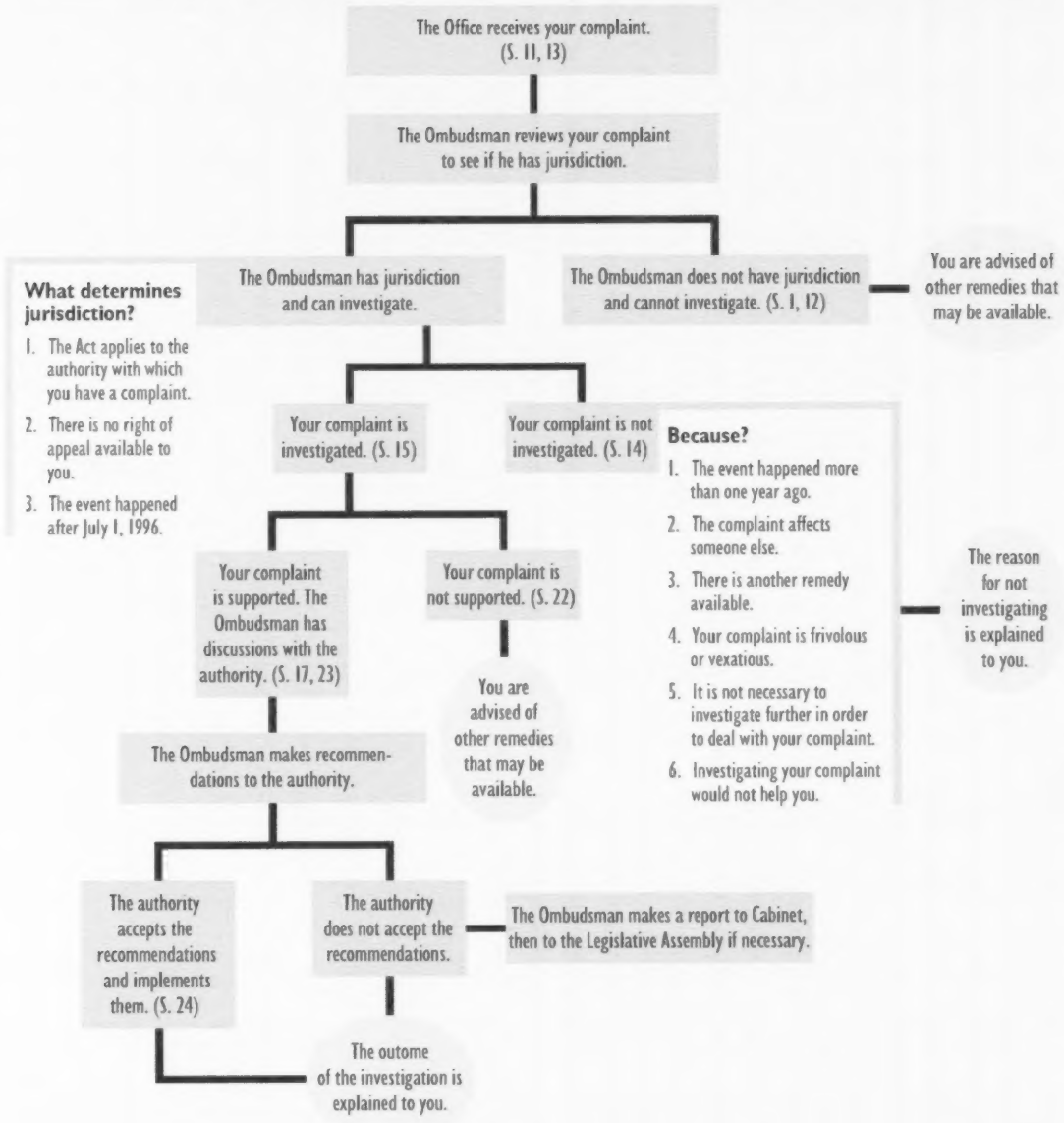
OMBUDSMAN TO NOTIFY AUTHORITY

15. (1) If the Ombudsman investigates a matter, he or she shall notify the authority affected and any other person he or she considers appropriate to notify in the circumstances.

(2) The Ombudsman may at any time during or after an investigation consult with an authority to attempt to settle the complaint, or for any other purpose.

(3) Where before the Ombudsman has made his or her decision respecting a matter being investigated he or she receives a request for consultation from the authority, he or she shall consult with the authority.

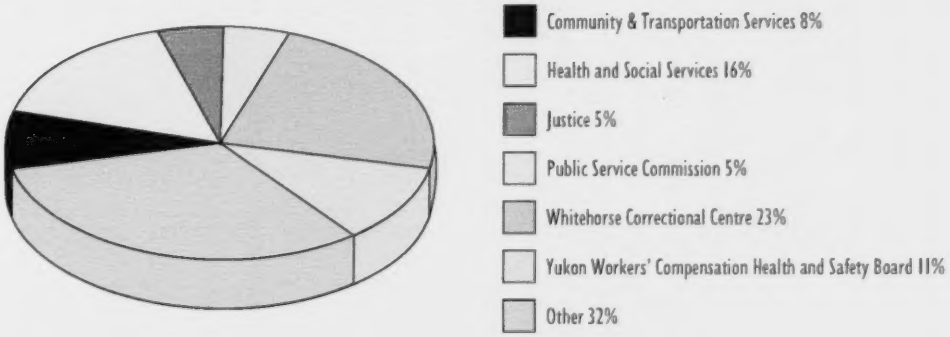
Ombudsman's
FLOW CHART OF COMPLAINTS


The Office receives your complaint. (S. 11, 13)
The Ombudsman reviews your complaint to see if he has jurisdiction.
What determines jurisdiction?
1. The Act applies to the authority with which you have a complaint.
2. There is no right of appeal available to you.
3. The event happened after July 1, 1996.
The Ombudsman has jurisdiction and can investigate.
The Ombudsman does not have jurisdiction and cannot investigate. (S. 1, 12)
You are advised of other remedies that may be available.
Your complaint is investigated. (S. 15)
Your complaint is not investigated. (S. 14)
Because?
1. The event happened more than one year ago.
2. The complaint affects someone else.
3. There is another remedy available.
4. Your complaint is frivolous or vexatious.
5. It is not necessary to investigate further in order to deal with your complaint.
6. Investigating your complaint would not help you.
The reason for not investigating is explained to you.
Your complaint is supported. The Ombudsman has discussions with the authority. (S. 17, 23)
Your complaint is not supported. (S. 22)
You are advised of other remedies that may be available.
The Ombudsman makes recommendations to the authority.
The authority accepts the recommendations and implements them. (S. 24)
The authority does not accept the recommendations.
The Ombudsman makes a report to Cabinet, then to the Legislative Assembly if necessary.
The outome of the investigation is explained to you.

Ombudsman's STATISTICAL SUMMARIES

JURISDICTIONAL COMPLAINTS RECEIVED IN 2001 (by Authority)

AUTHORITY	OPENED AS INVESTIGATION	NOT OPENED AS INVESTIGATION	TOTAL
Community & Transportation Services	-	7	7
Education	-	2	2
Government Services	-	2	2
Health and Social Services	1	13	14
Justice	-	4	4
Public Service Commission	-	4	4
Renewable Resources	1	1	2
School Councils	1	-	1
Tourism	-	2	2
Whitehorse Correctional Centre	2	19	21
Yukon College	-	1	1
Yukon Hospital Corporation	-	1	1
Yukon Housing Corporation	1	1	2
Yukon Human Rights Commission	-	2	2
Yukon Legal Services Society	1	1	2
Yukon Medical Council	-	1	1
Yukon Workers' Compensation Health and Safety Board	4	9	13
Other		2	2
TOTALS	**11**	**72**	**83**


Community & Transportation Services 8%
Health and Social Services 16%
Justice 5%
Public Service Commission 5%
Whitehorse Correctional Centre 23%
Yukon Workers' Compensation Health and Safety Board 11%
Other 32%

RESOLUTION OF JURISDICTIONAL COMPLAINTS RECEIVED IN 2001

	NUMBER OF COMPLAINTS	% OF TOTAL
Further inquiry	1	1.2
Referred to another remedy	51	61.4
Otherwise resolved	5	6.0
No authority to investigate	1	1.2
Declined on discretionary grounds	5	6.0
Formal investigation	11	13.4
Did not provide sufficient information	2	2.4
Other	5	6.0
Not yet analyzed	2	2.4
TOTAL	**83**	**100.0**

INVESTIGATIONS HANDLED IN 2001

Brought forward from 2000	27
Opened in 2001	11
Total Investigations in 2001	**38**
Completed in 2001	18
Carried over to 2002	20

OUTCOME OF INVESTIGATIONS COMPLETED IN 2001

Complaint Substantiated	7
Complaint Not Substantiated	2
Settled and/or Discontinued	9
TOTAL	**18**

NON-JURISDICTIONAL COMPLAINTS RECEIVED IN 2001

Businesses	21
Contracted Services	1
Courts	6
CPP, UIC & Revenue Canada	3
Federal	11
First Nations	6
Other	8
Other Provinces	2
Police - RCMP	8
YTG - Non-Jurisdictional	1
TOTAL	**68**

OMBUDSMAN REQUESTS FOR INFORMATION RECEIVED

THE FUNCTION OF THE Information and Privacy Commissioner

The primary purpose of the *Access to Information and Protection of Privacy Act* (the ATIPP Act) is to make departments and agencies of government (public bodies) more accountable to the public and to protect personal privacy. The *Act* does so in a number of ways:

- By giving the public a right of access to records;
- By giving individuals a right of access to, and a right to request correction of, personal information about themselves;
- By specifying limited exceptions to the rights of access;
- By preventing the unauthorized collection, use and disclosure of personal information; and
- By providing for an independent review of decisions made under this *Act*.

It is the office of the Information and Privacy Commissioner that carries out these independent reviews. However, the right to a formal review by the Commissioner is limited to the following decisions made under the *Act*:

- A refusal to grant access to a requested record;
- A decision to separate or obliterate information from a requested record;
- A decision about an extension of time for responding to a request for access to a record; and
- A decision to deny a request for a waiver of a fee imposed under the *Act*.

There is also a right of review if a person believes their personal information was collected, used or disclosed by a public body in a way that was contrary to the requirements of the *Act*.

A supplementary provision of the *Act* gives the Commissioner responsibility for monitoring how the *Act* is administered to ensure its purposes are achieved. The Commissioner may, among other things, receive complaints or comments from the public concerning the administration of the *Act*[1], conduct investigations into those complaints, and make reports. The Commissioner may also comment on the implications for access to information or for privacy protection of existing or proposed legislative schemes or programs of public bodies.

[1] "Administration of the *Act*" refers to anything done by the Archivist, a public body, or the Information and Privacy Commissioner, to meet the requirements of the *Act*.

YEAR IN REVIEW

This report details the operation of the office during 2001. As with the Ombudsman report, information related to our case work is presented through discussions of how various provisions of the *Act* operate. The topics chosen relate directly to cases handled during the year.

A look at the statistical tables will reveal that a total of 43 reviews were before the Commissioner in 2001. This consisted of 20 reviews received during the year, and 23 carried over from the previous year. During 2001 a total of 27 reviews were completed, leaving 16 reviews that were carried over into the year 2002.

There has been a significant reduction in the total number of outstanding investigations under section 42 of the *Act*. These are investigations based on complaints or comments from the public about the administration of the *Act*. Section 42 permits the Commissioner to conduct investigations into these public concerns to determine whether the *Act* is administered in ways that meet its expressed purpose. In 2001, complaints that were similar in nature were grouped together. Also, assessments were made to decide if investigations were still necessary in light of some changes in administrative practices and matters being dealt with by the courts. This exercise reduced the total number of these investigations to six. Two investigations were completed and four were carried forward to 2002.

The year 2001 marked the fifth anniversary of the introduction of public sector access and privacy legislation in the Yukon Territory. Last year's report commented on the challenges that exist for public bodies to meet the requirements of the *Act*. Over the past five years public bodies have generally responded well to straightforward access requests, but significant difficulties have been experienced when more complicated issues arise. Exceptional requests have taxed the resources of public bodies both in processing the requests and in responding to the Commissioner's reviews. This past year has been no exception.

One way to improve efficiency in administering the *Act* is to use the collective experience gained by departmental ATIPP Coordinators to further develop the government's ATIPP Policy and Procedures Manual. In this way the working knowledge of how the legislation should be applied can be shared across all departments and agencies of government. The Office of the Information and Privacy Commissioner continues to communicate the Commissioner's findings and recommendations following reviews to public bodies for the same reason.

During 2001 the Commissioner participated in discussions related to Project Renewal. One of the impacts of the government's reorganization initiative was to transfer the responsibility of the Archivist under the *Act* to the Records Manager in the newly created Department of Infrastructure. A dialogue was established to ensure the transfer process did not adversely affect the administration of the *Act*.

COMPLAINTS ABOUT THE INFORMATION AND PRIVACY COMMISSIONER

Section 47(1)(b) of the *ATIPP Act* requires the Commissioner to include in his annual report any complaints and reviews of complaints about the Commissioner's decisions, acts, or failures to act.

The purpose of this requirement is to provide a means for the Commissioner to be accountable. Because the Commissioner is an independent officer of the Legislative Assembly, no other mechanism exists to deal with complaints about the performance of the Commissioner.

The last annual report included, under this topic, reference to an individual's request that the Commissioner cease dealing with any outstanding matters involving the individual, and that the Commissioner take steps to have an acting Commissioner appointed. The Commissioner denied the request, prompting the individual to seek an order from the Yukon Supreme Court prohibiting the Commissioner from dealing with the outstanding matters. The court dismissed the case. The individual has appealed the court's decision to the British Columbia Court of Appeal.

In 2001, the same individual named the Information and Privacy Commissioner in a number of court actions involving issues arising from decisions made by the Commissioner in the course of dealing with various matters raised by this individual. In 2001, the Supreme Court of the Yukon dismissed or stayed the various actions and motions. The individual appealed the Supreme Court decisions to the Court of Appeal. The appeals have yet to be heard by the Court of Appeal.

REVIEW AND COMMENT ON PROGRAMS AND LEGISLATION

One of the roles of the Commissioner is to comment on government programs or proposed legislation that have an impact on the access or privacy rights of Yukoners. During 2001, the Commissioner commented on the following matters:

1. Proposed amendments to the Jury Act

The Department of Justice asked the Commissioner to comment on proposed amendments to the *Jury Act* that would give the Sheriff access to a wide range of records held by government for the purpose of compiling jury lists. The Commissioner noted that the amendment would authorize access to personal information without setting specific limitations. For example, the proposed amendment would authorize the Sheriff to examine any record held by a public body or municipality for the purpose of determining the eligibility of persons to be placed on a jury list.

The privacy principles reflected in the *ATIPP Act* places a responsibility on government to carefully assess the personal privacy impact and to consider the least invasive means necessary. It was not evident that such an assessment had been completed.

The Commissioner commented that if the requirement to determine juror eligibility includes, in the public interest, a need for the exemption of certain privacy protection principles, some safeguards should be in place. The following measures should be considered:

- If possible, identify the specific records of public bodies that contain the necessary information for examination by the sheriff;
- Specifically define the information from such records that can be collected by the sheriff; and
- Limit the use of the information by the sheriff, including any further secondary use, and set guidelines for its destruction when the information is no longer needed.

The Commissioner drew attention to the provisions of the same legislation in other jurisdictions where more specific limits are in place. A Privacy Impact Assessment template was sent to the department. The purpose of completing such an assessment is

to consider, in an organized and comprehensive way, all of the relevant factors for privacy protection when developing programs or legislation.

2. Whitehorse Correctional Centre – Screening of inmates' mail

The Commissioner was asked to review and comment on the current policy in place at the Whitehorse Correctional Centre for screening the mail of inmates. The Commissioner pointed out the specific provisions of the *ATIPP Act* that provide privacy protection, and the exceptions set out in the *Act* for legitimate law enforcement purposes as well as meeting the requirements of the *Corrections Act*.

Again, the Commissioner commented on the responsibility of government to adopt the least privacy invasive practice. The completion of a Privacy Impact Assessment was recommended.

Information and Privacy Issues

WHAT LIMITS ARE THERE TO ACCESS TO RECORDS?

The *ATIPP Act* gives individuals the right to access records, including personal information about themselves, in the custody or under the control of a public body. The right of access, however, is not absolute and there are exceptions. Access rights are balanced against the competing interest of the protection of personal privacy and some other limited conditions.

Access to records is subject to exceptions that are set out in sections 16 to 25 of the *ATIPP Act*. There are two categories of exceptions: mandatory and discretionary.

What is a mandatory exception?

The wording of a mandatory exception starts with the phrase "a public body *must* refuse to disclose" which gives a public body no other option but to refuse access. The *ATIPP Act* recognizes that certain kinds of information must not be disclosed and provides mandatory exceptions to protect that information. A mandatory exception applies to information if:

- The information would reveal Cabinet confidences;
- Disclosure would be harmful to the business interests of a third party;
- The information is about a third party and is in a tax record; or
- Disclosure would be an unreasonable invasion of a third party's personal privacy.

DISCLOSURE HARMFUL TO PERSONAL PRIVACY

25. (1) A public body must refuse to disclose personal information about a third party to an applicant if the disclosure would be an unreasonable invasion of the third party's personal privacy.

In cases where someone requests access to third party information the *ATIPP Act* assists in determining whether the exception to disclosure applies. It does so by listing what is deemed to be an unreasonable invasion of a third party's personal privacy. It also lists certain circumstances in which the release of personal information would not be an unreasonable invasion of a third party's personal privacy.

In 2001, there were three reviews conducted in which the public body refused access to records for the reason that disclosure would be an unreasonable invasion of a third party's personal privacy. In all cases the Commissioner found that the information requested was "personal information" as defined in the *ATIPP Act*, and also that it was information covered by this mandatory exception which requires the Commissioner to confirm that a public body must refuse the access to the records in question.

What is a discretionary exception?

Discretionary exceptions to the right of access permit a public body to choose whether or not to withhold all or part of a record. The wording of a discretionary exception starts with the phrase "a public body *may* refuse to disclose" which requires a public body to apply certain considerations before deciding whether to give access to the requested record. There are eight discretionary exceptions:

- Advice from officials to a public body or a Minister;

- Disclosure harmful to the financial or economic interests of a public body;
- Solicitor-client privileged information or legal advice of a public body;
- Disclosure harmful to law enforcement;
- Disclosure harmful to intergovernmental relations;
- Disclosure harmful to the conservation of heritage sites, etc.;
- Disclosure harmful to individual or public safety; and
- Information that is or will be available to the public.

Two reviews were conducted in 2001 about refusals to grant access to records by public bodies because disclosure could reasonably be expected to interfere with law enforcement. The *Act* contemplates a public body will exercise its discretion so that it takes into account the rights of access and, on the other hand, a public body's responsibility to safeguard other interests.

The Commissioner endorses the process described by Michele Vincent in an article[2] about how public bodies first decide whether the records falls within the exception, and then decide whether the record should nevertheless be disclosed even though the exception applies. When exercising this discretion, a public body must act in good faith, and make its decision for a proper purpose based only on relevant considerations while promoting the objects and purpose of the access and privacy legislation.

If the Commissioner determines information at issue does fall within the exception then the *Act* permits the Commissioner to either affirm that the public body should continue to refuse the access or recommend that the public body reconsider its decision if the Commissioner believes that the public body has not properly used its discretion. In both cases, the Commissioner was satisfied with the discretionary decision of the public bodies and affirmed that they should continue to refuse access.

LEGAL ADVICE

18. A public body may refuse to disclose to an applicant a record

    (a) that is subject to solicitor client privilege; or

    (b) that was prepared by or for a public body in contemplation of and for the purpose of existing or reasonably expected proceedings in court or before an adjudicative body, regardless of whether it has been communicated to or from a lawyer.

WHEN CAN SOLICITOR-CLIENT PRIVILEGE BE USED TO REFUSE ACCESS?

Refusing access to a record because of solicitor-client privilege is another example of a discretionary exception. However, applying the discretion involves some special considerations. There are two branches of solicitor-client privilege. One branch involves confidential solicitor-client communications that are intended to be confidential and for the purpose of seeking or giving legal advice. The other branch of solicitor-client privilege is confidential communications in preparation for litigation, referred to as litigation privilege.

The distinction between these two branches has significance for the protection of information under the *ATIPP Act*. Normally litigation privilege protection ends when the litigation ends. During 2001, two reviews were completed that required the Commissioner to interpret this discretionary exception. As a result the Commissioner has interpreted section 18(b) to allow for the protection of such confidential communication beyond the end of litigation. The Commissioner accepted the evidence of the public body that the records at issue were

[2] "*A Review of the Jurisdiction and Exceptions under the Freedom of Information and Protection of Privacy Act of Alberta*", published in the *Canadian Journal of Administrative Law & Practices, Vol. 12, No 3 [1999]*

records to which litigation privilege applied. Circumstances did not persuade the Commissioner to recommend that the public body reconsider its decision, therefore, he affirmed that the public body should continue to refuse the access to the records.

The result of this interpretation is that a public body may decide to refuse access to records because of:

- confidential communications between solicitor and client for the purpose of seeking or giving legal advice; or
- communications between a client, his or her lawyer and a third party, where the dominant purpose of the communications is to prepare for, advise on or conduct litigation whether or not there continues to be any expectation of litigation.

WHAT IS THE CONNECTION BETWEEN "INFORMATION" AND "RECORDS"?

A vague or overly general request may unnecessarily increase the time that is spent by the Archivist and public body to respond to an access request. It may also lead the public body to consider information that was not within the intended scope of the request. Often a request is broad or vague because the applicant lacks knowledge about the public body or the type of records it has. It is always of benefit for the public body to establish contact with the applicant to better understand what specific records will satisfy the applicant's request. The applicant can clarify the request and also has an opportunity to change the scope of the request, if appropriate.

The efficient administration of the *Act* requires a successful transition from "*information*" to "*records*". Information is anything that is contained in or on records. A record is defined in the *ATIPP Act* as any medium on which information is stored or recorded. If an access request is for general information, the *ATIPP Act* requires that the relevant records relating to that request be identified. The *ATIPP Act* places a duty on the applicant to provide sufficient detail to identify the record. A duty is also imposed on the Archivist and the public body to assist the applicant, and to carry out a diligent search for the responsive records. A response to the applicant must be open, accurate and complete.

In 2001, in the course of a review of a public body's decision to refuse access, the Commissioner considered whether the Archivist and the public body properly identified "records" responsive to the request. In this situation the Archivist had asked for clarification from the applicant because it was difficult to identify the specific records the applicant sought. Because the applicant did not provide any further clarification, despite requests by the Archivist to do so, the Commissioner found that the public body had discharged the duty to assist the applicant.

CAN PERSONAL INFORMATION BE CORRECTED?

If an individual believes that personal information held by a public body contains an error or omission, a request may be made to have that information corrected. An error is either mistaken or incorrect information or information that does not reflect the facts. An omission is information that is incomplete or missing, or that has been overlooked.

In a report after review in 2001, the Commissioner endorsed the following guidelines adopted in British Columbia for how public bodies should consider a request for correction of personal information:

- that a decision about whether or not to correct should be made in good faith without prejudging or bias;
- it is only appropriate to correct an objective fact where the public body has decided that the information on record is in fact incorrect and the applicant's version is the correct one; and
- there is no specific standard that a public body has to meet regarding the time, financial or other resources in assessing where the

RIGHT TO REQUEST CORRECTION OF PERSONAL INFORMATION

32. (1) A person who believes there is an error or omission in his or her personal information may request the archivist to request the public body that has the information in its custody or under its control to correct the information.

(2) If no correction is made in response to a request under subsection (1), the public body must annotate the record with the correction that was requested but not made.

(3) If personal information is corrected or annotated under this section, the public body must give notice of the correction or annotation to any public body or any third party to whom that inform-ation has been disclosed during the year before the correction was requested.

(4) On being notified under subsection (3) of a correction or annotation of personal information, a public body must make the correction or annotation on any record of that information in its custody or under its control.

If a public body decides not to correct the information, it must annotate the record. To annotate means a public body must attach to the record the correction that was requested but not made.

If a public body annotates or corrects any information, it must ensure the new information is stored with the original information in a way to enable it to be retrieved whenever the information in question is being used. If the information had been used in the year prior to the request for correction the public body is required to inform those who used it. Others, once notified of a correction or annotation, must make sure the correction or annotation is made to the relevant personal information in their possession. This ensures that decision-makers using this information are as well informed as possible.

In the review before the Commissioner, several records contained information the applicant felt was incorrect. The public body decided not to correct the information, but rather, the public body attached the applicant's letter of request for the correction and re-asserted its version of the facts as the annotation on the records. The Commissioner found that the public body failed to annotate the records at issue in accordance with the *ATIPP Act* since it did not enable each record to be read in its original form and at the same time make everyone using each record immediately aware of the applicant's disagreement with specific information contained in the record.

The resulting recommendation was not accepted by the public body. The *ATIPP Act* does not give a right of appeal to the applicant with respect to a decision by the public body in these circumstances. Subsequent meetings between the Commissioner and the public body about the administration of the act resulted in agreement that an annotation itself must contain the specific requested correction, not just a reference to a letter making the request. This led the Archivist to conduct a policy review on how public bodies should make annotations to a record.

CAN A PUBLIC BODY DISREGARD AN ACCESS REQUEST?

A public body normally is required to respond to a request in 30 days. Section 43 of the *ATIPP Act*, however, allows a public body to ask the Commissioner to authorize it to disregard an applicant's requests for access to records. Such an authorization can only be given if the requests are repetitious or systematic and unreasonably interfere with the operation of a public body. In certain circumstances a public body may also ask the Commissioner to authorize that similar future requests be disregarded.

POWERS TO AUTHORIZE A PUBLIC BODY TO DISREGARD REQUESTS

43. (1) If a public body asks, the commissioner may authorize the public body to disregard requests under section 6 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body.

(2) If the commissioner authorizes the public body to disregard the request and the public body does disregard the request, the applicant may appeal the public body's decision to the Supreme Court under sections 59 to 61 without first requesting a review by the commissioner under section 48.

In 2000, the Commissioner considered section 43 applications made by two public bodies in relation to one person who had made a large number of access requests to a variety of public bodies. The Commissioner was asked by the two public bodies to disregard the specific access requests, and that future requests from this person be disregarded as well.

The Commissioner authorized the public bodies to disregard the specific access requests on the basis that the information being sought was a duplication of information contained in a previous access requests by the same person, and that a response to this access request would unreasonably interfere with the operations of the public bodies. The Commissioner did not authorize the public bodies to disregard future requests because an overall pattern of repetitious or systematic requests on the part of the person, that would unreasonably interfere with the operation of the two public bodies, was not established.

WHAT PERSONAL INFORMA-TION CAN BE USED IN A SECTION 43 APPLICATION?

In 2001, the Commissioner was asked to review whether personal information contained in access to information request forms was improperly used. In this case, a person made numerous requests for access to information to various public bodies. The public body making the section 43 application used the person's access request forms directed to *other* public bodies to support its application. The issue for the Commissioner was whether the public body was entitled to disclose personal information from access requests in a section 43 application. The Commissioner decided that an applicants' access requests to the public body making the section 43 application have the statutorily required "reasonable and direct connection" to the application to permit their disclosure. As a result, personal information from the applicant's access requests to the public body could be used to support the application. In this case, however, personal information from access requests to public bodies other than the one making the application was used. The Commissioner decided that information from access request forms that are directed to public bodies other than the one making the application are not relevant and cannot be used to support the section 43 application because the "reasonable and direct connection" is lost.

DEFINITION OF CONSISTENT PURPOSES

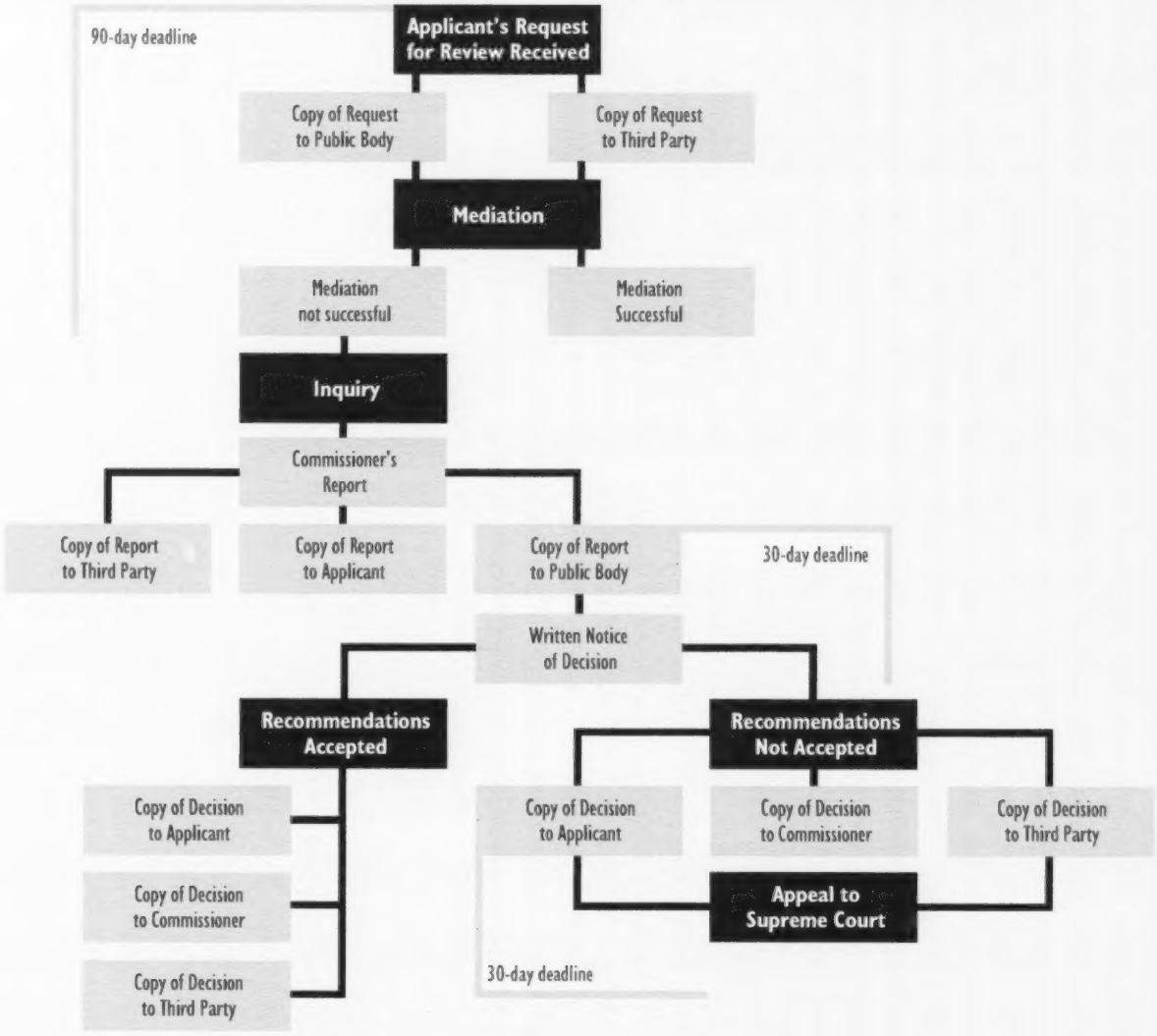
37. A use of personal information is consistent under 35 and 36 with the purposes for which the information was obtained or compiled if the use

(a) has a reasonable and direct connection to that purpose; and

(b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses the information or to which the information is disclosed.

Information and Privacy Commissioner

REQUEST FOR REVIEW FLOW CHART



Information and Privacy Commissioner

STATISTICAL SUMMARIES

ATIPP FILES BY LEGISLATION

Section of the Act	Description	Files Received in 2001
42(b)	General powers to receive complaints or comments from the public concerning the administration of the Act, conduct investigations into those complaints, and report on those investigations.	6
42(c)	General powers to comment on the implications for access to information or for protection of privacy of existing or proposed legislative schemes or programs of public bodies.	3
48(1)(a)	Request for a review of a refusal by the public body or the Archivist to grant access to the record.	15
48(1)(b)	Request for a review of a decision by the public body or the Archivist to separate or obliterate information from the record.	1
48(1)(c)	Request for a review of a decision about an extension of time under section 12 for responding to a request for access to a record.	1
48(2)(a)	Request for a review of the public body's refusal or failure to correct personal information.	1
48(3)	Request for a review of a complaint that a public body has not collected, used or disclosed information in compliance with the Act.	1
48(4)	Request by a third party for a review of a decision by a public body to disclose personal information about the third party.	1

ATIPP REQUESTS FOR REVIEW RECEIVED IN 2001

Public Body	
Education	1
Health and Social Services	8
Justice	2
Public Service Commission	4
Renewable Resources	1
Yukon Workers' Compensation Health and Safety Board	4
TOTAL	**20**

S. 48 REQUESTS FOR REVIEW HANDLED IN 2001

Brought forward from 2000	23
Opened in 2001	20
Total Requests for Review in 2001	**43**
Completed in 2001	27
Carried over to 2002	16

OUTCOME FOR S. 48 REQUESTS FOR REVIEW IN 2001

To inquiry	16
Successfully mediated	2
Discontinued	9
TOTAL	**27**
Carried forward to 2002	16
TOTAL	**43**

S. 42(b) COMPLAINTS RECEIVED IN 2001

TOTAL	**6**
Under Investigation	4

S. 42(b) COMPLAINTS UNDER INVESTIGATION IN 2001

Public Body	
Economic Development	1
Education	1
Justice	1
Yukon Workers' Compensation Health and Safety Board	1
TOTAL	**4**

ATIPP REQUESTS FOR INFORMATION RECEIVED

TOTAL	**48**

WEB SITE LINKS

Alberta Information and Privacy Commissioner
A variety of information pertaining to the Alberta Freedom of Information and Protection of Privacy Act, as well as information about the Commissioner's Office.
www.oipc.ab.ca/

British Columbia Information and Privacy Commissioner
Includes legislation, orders, information on decisions, investigations as well as other reports, information about the office, policies, news releases, publications and useful links.
www.oipcbc.org/

Government of Yukon
Links to Yukon facts, travel information, government, government leaders, and news.
www.gov.yk.ca

Information Commissioner of Canada
Information about the Federal Information Commissioner and links to Access to Information Acts, reports, publications and speeches.
www.infocom.gc.ca

International Ombudsman Institute
Worldwide organization of Ombudsman offices.
www.law.ualberta.ca/centres/ioi/index.htm

Ontario Information and Privacy Commissioner
Includes Access and Privacy Acts, annual reports, a selection of investigations, policy papers, orders that have been issued by the office and links to other relevant sites.
www.ipc.on.ca/

Open Government Canada
A freedom of information coalition seeking a national voice for freedom of information users.
www.opengovernmentcanada.org

Privacy Commissioner of Canada
Information about the Federal Privacy Commissioner and links to Privacy Acts, reports, presentations and numerous e-commerce sites.
www.privcom.gc.ca

Yukon Office of the Ombudsman
Information about the Yukon Ombudsman and Information & Privacy Commissioner.
www.ombudsman.yk.ca

Yukon Records Manager
The Records Manager has responsibility under the ATIPP act to receive all requests for access to information and coordinates the handling of the request with the public body having custody or control of the responsive record.
www.gov.yk.ca/depts/infrastructure/ict/atipp/